Supreme Court, U.S.
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Nos. 02-1124, 02-1135

IN THE

Supreme Court of the United States

JULIANNE M. BOWLER, in her official capacity as the Commissioner of Insurance of the Commonwealth of Massachusetts and Permanent Receiver of American Mutual Liability Insurance Company and American Mutual Insurance Company of Boston,

-and-

ALABAMA INSURANCE GUARANTY ASSOCIATION, *et al.*,

Petitioners,

v.

UNITED STATES; JOHN ASHCROFT, in his official capacity as Attorney General of the United States,

Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR NATIONAL CONFERENCE OF INSURANCE GUARANTY FUNDS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

In the present case, the court of appeals concluded that "[a]n early bar date for United States claims has only a limited effect on policyholders" in insurance insolvencies. This conclusion is contrary to the record in this estate and in estates nation-wide, and led the circuit court to incorrectly apply *United States Dept. of the Treasury v. Fabe*, 508 U.S. 491 (1993). The bar date plays a vital role in allowing timely payments to policyholders, and squarely implicates the "business of insurance" under the McCarran-Ferguson Act. If the federal government may ignore the bar date, the federal government could continue to indefinitely hold hostage payments to policyholders.

This case presents the following question: Does a bar date in a state's statutory scheme regulating the liquidation of insurance companies apply to claims of the United States because it "regulates the business of insurance" under the McCarran-Ferguson Act?

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INTEREST OF *AMICUS CURIAE*

Amicus National Conference of Insurance Guaranty Funds ("NCIGF") is a national association of member property and casualty insurance guaranty funds of the 50 states, the District of Columbia and Puerto Rico. *Amicus* presents this Memorandum to the Court because it is uniquely positioned to offer a national perspective demonstrating how claims-filing deadlines ("bar dates") in property and casualty insurance insolvencies directly "further the goal of protecting policyholders" under the Supreme Court's decision in *United States Dept. of the Treasury v. Fabe*, 508 U.S. 491 (1993) ("*Fabe*"). Bar dates are a practical necessity for the payment of policyholders.

This case is of substantial significance to the NCIGF and its members due to the financial ramifications and administrative uncertainty that will result in insurance insolvencies if the Court concludes that the federal government is not bound by bar dates.[1]

STATEMENT OF THE CASE

This case arises from the liquidation of two insolvent insurance companies, American Mutual Liability Insurance Company and American Mutual Insurance Company of Boston (collectively "American Mutual"), and the application of two state statutory provisions to claims made by the United

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1. *Amicus* states that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus* and its counsel, contributed monetarily to the preparation and submission of this brief. *Amicus* is filing this brief with the consent of all parties. Letters of consent have been filed with the Clerk of the Court.

States. In 1989, a Massachusetts state court appointed the state's Commissioner of Insurance as the Receiver of American Mutual. The state court also ordered all creditors of American Mutual to file claims with the Receiver by March 9, 1990.

The United States contended that, pursuant to the Federal Priority Act, 31 U.S.C. § 3713 (2000), it was entitled to priority distributions and immune from the one-year bar date. Under the Federal Priority Act, the Receiver is personally liable for the non-payment of valid claims by the United States. 31 U.S.C. § 3713(b) (2000). Because the assets of American Mutual are insufficient to satisfy all outstanding claims, the Act's potential personal liability is a live threat to the Receiver.

The Receiver then brought the underlying action. The district court held that the one-year bar date did not "regulate the business of insurance" and was thus preempted by the Federal Priority Act. *Ruthardt v. United States*, 164 F. Supp. 2d 232 (D. Mass. 2001). Though supportive of the Receiver's position on the merits, the district court explained that it was constrained by the decision in *Garcia v. Island Program Designer, Inc.*, 4 F.3d 57 (1st Cir. 1993). The circuit court affirmed this decision. *Ruthardt v. United States*, 303 F.3d 375 (1st Cir. 2002).

SUMMARY OF THE ARGUMENT

The circuit court concluded that:

> An early bar date for United States claims has only a limited effect on policyholders — who have priority anyway — and equally or primarily helps other general creditors.

Ruthardt, 303 F.3d at 385. This conclusion of a "limited effect on policyholders" is the crux of the circuit court's decision. The conclusion is contrary to the record in this estate and the reality of other estates nation-wide. In fact, as demonstrated below, the bar date plays an essential role in allowing timely payments to policyholders, a function that squarely implicates the McCarran-Ferguson Act.[2] *Fabe*, 508 U.S. at 506 (a "statute is enacted 'for the purpose of regulating the business of insurance' to the extent that it serves to ensure that, if possible, policyholders ultimately will receive payment on their claims") (citation omitted).

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2. "Policyholders" refers to all denizens of the second priority of the liquidation claims priority statute (the "policyholder priority"), which includes all first- and third-party claimants and all guaranty fund claims. A first-party claimant is the holder of the insurance policy, a third-party claimant is not the holder, but has rights of recovery under the policy. For instance, with a car accident, the car owner has a first-party claim against his insurer, and a third-party involved in the accident may have rights of recovery against the car owner and thus under the car owner's policy. The guaranty funds, through their early payments to both first- and third-party claimants, are subrogated to their rights. "Policyholders" in this brief refers to all such persons having rights under the policies, unless otherwise stated.

If the bar date is not enforced against the federal government, the Receiver will not distribute funds to policyholders. The Receiver's declination is not petulance: the Receiver faces the prospect of personal liability under the Federal Priority Act. If the Receiver distributes the remaining funds to policyholders and thereafter the federal government — perhaps years from now — submits policyholder claims, the Receiver will have no means of payment, and thus will be exposed to personal liability to the federal government for such claims.

The result of the federal government's position is that the federal government may indefinitely hold hostage the Receiver's planned payments to policyholders. This result — which is the current status of this estate — cannot possibly be consistent with the McCarran-Ferguson Act.

REASONS FOR GRANTING THE PETITION

I. Without a Binding Bar Date, the Threat of Future Federal Policyholder Claims Creates Gridlock for Final Payment of All Policyholders.

The federal government has submitted only one policyholder claim to date in the American Mutual estate. It is thus tempting to infer that this case involves only late-filed, general creditor claims of the federal government. This inference, however, is not accurate. This dispute does not, as the federal government has asserted below, turn on a small amount of late-filed claims.

Instead, the dispute revolves around whether the federal government will submit additional *policyholder* claims at some point *in the future*. No one knows whether the federal

government will do so, but the risk that the federal government will do so is substantial enough that, coupled with the Receiver's potential for personal liability, the prospect of such claims has paralyzed the distribution process.

The Receiver has ample reason to worry that the federal government may someday file additional policyholder claims. Liability claims, even those incurred at the time of liquidation, may not be known and determined until years later, particularly where large commercial insurers are involved.[3] And sorting out, with finality, all the claims of the federal government potentially takes many years because, as its counsel put it in simple terms in the proceedings below, the government is huge. To be sure, the federal government's unwillingness, after fourteen years, to issue a final waiver of claims in this liquidation cements the Receiver's concern.

A. Because Distributions Are Pro Rata By Class, Delay in Identifying and Liquidating Federal Policyholder Claims Delays Final Payment of All Policyholder Claims.

Under the Massachusetts liquidation claims priority statute (as in every other state), distributions are made by priority. 1st Priority claims are paid in full first, then 2nd Priority claims are paid in full, and so on through the lower priorities. Lower priority claims receive nothing until higher priority claims are first paid in full. Claimants within a

3. By contrast, most general creditor claims are likely to be identified at or shortly after the liquidation commences. For example, supplier claims, which are a common type of general creditor claim, are typically either on the books of the insolvent insurer at the time of the liquidation or are billed shortly thereafter.

priority share ratably in a distribution. For example, a partial 2nd Priority distribution must be shared pro rata among 2nd Priority policyholder claimants.

In this estate — as is the case in almost all property and casualty insurer insolvencies — there are funds to pay in full the administrative expenses of the liquidation (1st Priority), but there are not enough funds to pay all policyholder claims (2nd Priority) in full, nor any funds to pay lower priority claims anything at all. *Thus, the only practical issues are how much money certain policyholder claimants (2nd Priority) will receive, and when they will receive it.*

The chart below illustrates the priorities and how they work here:

Liquidation Claims Priority	Will Be Paid?	Relevance to This Dispute
1st Administrative Expenses	Yes, in full	None
2nd Policyholder Claims (Including Future Federal Policyholder Claims)	Yes, partially	Under *Ruthardt*, they will not be paid until all future federal policyholder claims are resolved or waived.
3rd Unearned Premium Claims	No	None (1) There are insufficient funds to reach these priorities; and (2) Even if funds might be available, under *Ruthardt*, no payment could occur until higher priorities are satisfied in full, which could not happen without definitively knowing the extent of future federal policyholder claims.
4th General Creditor Federal Claims	No	
5th Wage Claims	No	
6th State and Local Tax Claims	No	
7th General Creditor Claims	No	

If the Receiver does not know the extent of the federal government's policyholder claims, then she cannot determine how much to distribute to *any* policyholders. With no bar to the federal government filing policyholder claims in the future, the Receiver cannot determine how much to ratably distribute within the policyholder class.

To distribute funds to policyholders, the Receiver must first calculate:

$$\frac{\text{\$ Available to Distribute}}{\text{Total \$ Amount of Policyholder Claims}} = \text{Payment \%}$$

And then for each policyholder claimant:

$$\text{Payment \%} \times \text{Individual Policyholder Claim} = \text{Policyholder Payment}$$

If the federal government cannot, or will not, identify the extent of its policyholder claims, then the Receiver cannot know the denominator ("Total $ Amount of Policyholder Claims"), and thus without this figure cannot calculate the proper payment percentage for any policyholder. This uncertainty results in paralysis.

No policyholder distribution will occur unless:

- The Receiver wants to gamble on there being no future federal policyholder claims; or
- The federal government waives its future policyholder claims.

The Receiver cannot be faulted for not gambling. Nor has the federal government waived future policyholder claims, even though this liquidation began fourteen years ago, and the policies on which its claims would be based are at least that old.

The district court aptly observed that actual "late-filed federal *policyholder* claims may substantively, and rather directly, interfere with the timely and orderly distribution of funds to general creditors." *Ruthardt v. United States*, 164 F. Supp. 2d at 244. Unfortunately, the district court did not discuss the devastating effect of the mere threat of late-filed federal policyholder claims on the "timely and orderly distribution of funds" to other policyholders — the only class of claimants with any chance of recovery.

Because the bar date is "reasonably necessary to further the goal of protecting policyholders," and "serves to ensure that . . . policyholders ultimately will receive payment on their claims," *Amicus* NCIGF respectfully requests that the Court find that the bar date falls within the scope of the McCarran-Ferguson Act. *Fabe*, 508 U.S. at 506, 509.

B. Bar Dates Are a Ubiquitous Necessity That Deserve the Same McCarran-Ferguson Protection as Administrative Costs.

Bar dates are as necessary to an orderly liquidation as the preferential payment of administrative costs. In *Fabe*, the Court found that, "[w]ithout payment of administrative costs, liquidation could not even commence," and thus ruled that administrative costs are "reasonably necessary to further the goal of protecting policyholders." Similar recognition of necessity is due bar dates for the reasons above. Without a

bar date, the most important aspect of the insurance liquidation process — the distribution of assets to policyholders — cannot occur.

There is no question that liquidators and guaranty funds throughout the fifty states see bar dates as a practical necessity. *See, e.g., Mercado Boneta v. Adminstracion Del Fondo de Compensacion al Paciente*, 125 F.3d 9, 18 (1st Cir. 1997) ("Absent a claims bar date, neither the affairs of PCFA nor the interest of pending claims could be finalized."). They are not merely "convenient." Bar dates do not exist simply to make the liquidator's job easier, but instead exist to make the liquidator's job possible, and thus to protect the interests of policyholders.

As such, the importance of bar dates to an orderly liquidation easily satisfies the requirements articulated in *Fabe* and its progeny. *See, e.g., Stephens v. American International Insurance Co.*, 66 F.3d 41, 45 (2nd Cir. 1995) (a state liquidation anti-arbitration law "has the end, intention, or aim of adjusting, managing or controlling the business of insurance, in that it *regulates the winding up of an insolvent insurance company*") (internal quotations omitted) (emphasis added); *Boozell v. United States*, 979 F. Supp. 670, 675 n.3 (N.D. Ill. 1997) (applying the "'end, intention, or aim of adjusting, managing, or controlling the business of insurance'" standard set forth in *Fabe* to find that the McCarran-Ferguson Act applies to the bar date).

To the best of *Amicus* NCIGF's knowledge, there has *never* been a property and casualty insurance liquidation without a claims bar date. The bar date may result in a complete cut-off of claims, or, alternatively, it may result in the subordination of late claims. *See, e.g., Clark v. Blue Cross*

Blue Shield of West Virginia, 510 S.E.2d 764, 780 (W. Va. 1998). Regardless of the individual circumstances, a bar date is always established in a property and casualty insurance insolvency proceeding. The bar date is indispensable to the administration of the estate.

The crucial role of bar dates in the administration of bankruptcy cases is also undeniable. *See, e.g., In re Drexel Burnham Lambert Group, Inc.*, 148 B.R. 1002, 1009 (S.D.N.Y. 1993) ("[Ignoring the bar date] would require recomputation . . . of everything which had occurred in reliance on the claims timely filed . . . , the promulgation of the Plan of Reorganization ... and the distributions of assets already made. . . ."); *In re Stern*, 70 B.R. 472, 475 n.4 (Bankr. E.D. Pa. 1987) (ignoring the bar date "would destroy the objective of finality which Congress obviously intended to promote"); *In re Milan Steel Fabricators, Inc.*, 113 B.R. 364, 367 (Bankr. N.D. Ohio 1990) ("The requirement that creditors file proofs of claim within a limited time . . . is necessary if cases are to be administered effectively.").

In the liquidation of insurance companies, bar dates are no less crucial, particularly where, as here, *future* federal policyholder claims are the threat.

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The circuit court concluded that the Federal Priority Act — enacted in 1789 by the very first Congress — ill fits the circumstances of the twenty-first century. 303 F.3d at 385 ("In a complicated liquidation, understandably the Commissioner . . . does not know exactly what claims the United States has so far failed to discover and assert. Some uniform limit is plainly needed."). *Amicus* NCIGF submits

that the trouble is far greater than perceived by the circuit court. Unless the Court recognizes that bar dates protect policyholders under the McCarran-Ferguson Act, the final payment of policyholders in insurance insolvencies nationwide will continue to be threatened by possible future federal policyholder claims. Because the federal government has still not waived such claims fourteen years after the American Mutual receivership began, now is the time to recognize the overwhelming, practical importance of bar dates for policyholders under *Fabe* and to hold the federal government subject to the bar date.

CONCLUSION

For the reasons stated above, *amicus* NCIGF respectfully urges the Court to grant the Petition.

Respectfully submitted,

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